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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 461

RUTH PAGE FISHER and THOMAS HART FISHER,
Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., a corporation,
Respondent.

Petitioners' Reply Brief

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I.

Was The Federal Question Raised In The State Court At The Earliest Fair Opportunity?

Respondent argues (p. 8-9) under Point I-(a) that Petitioners did not raise the Federal question in the State Court "at the earliest fair opportunity," upon the theory that the Federal question was not raised in either the Municipal Court or the intermediate Appellate Court, but was only raised in the Petition for Leave to Appeal in the Illinois Supreme Court, and (b) that the latter Court did not expressly pass upon it in denying the petition.

To this argument, Petitioners reply, *first*, that despite the usual rule that the Federal question must be raised in the State trial court, there is a well-recognized exception which is applicable to cases where (as in the case at bar) the issue over the denial of a Federal right is raised unexpectedly by the new and unanticipated act of the State Appellate or Supreme Court and, *second*, that when the Federal question so raised is asserted in an application for appeal to the State Supreme Court (as in the case at bar), then it makes no difference whether or not that Court in denying the application expressly passes upon the merits of the Federal question. These propositions are fully sustained by well-settled rules and decisions of this Court, as we shall now show.

(a) Whenever a litigant is surprised by a decision of any State court (whether trial, Appellate or Supreme) which first raises the Federal question, that is to say, whenever the litigant could not have reasonably anticipated that such State court would raise the Federal question, then it is sufficient for the litigant to assert the Federal question for the first time in the next higher State court on a further appeal thereto, following the "surprise" decision wherein the Federal question was born. As we shall show, below, the "surprise" decision was born in this case when the Illinois Appellate Court's judgment affirming the trial court judgment became final in the State Appellate Court.

The leading decision of this Court is *Saunders* v. *Shaw*, 244 U.S. 317, decided in 1917 in a unanimous opinion by Mr. Justice Holmes. In that case the Federal question (lack of due process under the 14th Amendment to the Federal Constitution) was not raised until *after* the Supreme Court of Louisiana had decided the case, the Fed-

eral question being first asserted by an assignment of errors filed by the appellant only one day before the Chief Justice of the Louisiana Supreme Court granted the writ of error to this Court. Mr. Justice Holmes held that the Federal question was raised in apt time, and said in his opinion (p. 320):

> "The record discloses the facts but does not disclose the claim of [Federal] right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state [Louisiana] granted this writ [of error]. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court *done unexpectedly* at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. *The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance.* . . . It appears that shortly after the [Louisiana] Supreme Court had declined to entertain the petition for rehearing, the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state [Supreme Court] by his assignment of errors. We do not see what more he could have done.
>
> Judgment reversed." (Italics added.)

In other words, the appellant in this Court had properly raised the Federal question for the first time in the Supreme Court of Louisiana in his assignment of errors, after judgment.

Similarly, it is held in *Missouri* v. *Gehner*, 281 U.S. 313, 320, that the appellant is not "bound to anticipate" or "in advance to invoke" Federal protection of his constitutional and statutory rights under Federal law. As in the

Saunders case, this Court held that the assertion of the Federal questions for the first time in a motion for rehearing in the Missouri Supreme Court was sufficient, even though it did not pass upon the Federal questions in its ruling upon the motion for rehearing, citing the *Saunders* case.

Similarly, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, the Federal question was not raised until after the decision of the Missouri Supreme Court, at which time the petitioner filed a petition for rehearing. The Federal issue was the same as in the case at bar, namely, the deprivation of the right of petitioner to an opportunity to be heard and present his case and to defend his substantive right in the trial court. This was held to be adequate insofar as the time for raising the Federal question was concerned.

In *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (cited and relied upon in Respondent's Brief (p. 11, 13)), a unanimous opinion by Mr. Justice Brandeis, the question was whether the deprivation of due process under the 14th Amendment was raised too late in a petition for rehearing in the Idaho Supreme Court. Although this Court held in that instance that the Federal question was asserted too late, this Court was careful to note (p. 164) the exception in such cases as *Saunders* v. *Shaw*, *Missouri* v. *Gehner*, and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, *supra*, where the Federal claim arose from an unanticipated disposition of the case in the State Appellate or Supreme Court. This Court noted that the complaining party had actually invoked the parallel due process clause of the Idaho Constitution to that contained in the 14th Amendment to the Federal Constitution, as indicating that the complaining party was obviously not surprised by the decision of the Idaho Supreme Court.

Again, in *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, a unanimous opinion by Mr. Justice Cardozo, the first time the Federal right under the 14th Amendment was raised was in a petition for rehearing in the Montana Supreme Court. This Court referred to the usual rule that a Federal question must be raised at the first opportunity and when raised for the first time in a petition for rehearing in the State Supreme Court usually comes too late, but carefully added (p. 367) that there is a well-recognized exception in cases "where the grounds of the decision [of the State Appellate or Supreme Court] supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right," citing the *Brinkerhoff, Missouri* and *American Surety Co.* cases, *supra.*

In the famous case of *Herndon* v. *Georgia*, 295 U.S. 441, the claim of Federal right to due process under the 14th Amendment was asserted for the first time in the Georgia Supreme Court by a motion for rehearing, which motion that Court refused to consider. The petitioner relied upon the exception to the general rule, claiming that the Federal question first arose from the unanticipated act of the Georgia Supreme Court. This Court confirmed the validity of the exception, saying (p. 444):

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated", citing the *Saunders, Missouri, Brinkerhoff, American Surety Co.* and *Great Northern* cases, *supra.*

Applying the foregoing exception to the case at bar, it is plain that Petitioner, Ruth Page Fisher, could not possibly have raised the Federal question in the Municipal Court of Chicago, since she never appeared in that Court.

or participated in any proceedings therein prior to the entry of the final judgment for possession and money costs against her.

The Federal question was first raised in the case at bar in the Illinois Appellate Court, by its final decision overruling Petitioners' Petition for Rehearing. Therefore, until the Petitioners' application for rehearing was denied, which was the final decision in the Illinois Appellate Court, there was no opportunity for Petitioner, Ruth Page Fisher, to raise the Federal question in the Illinois State courts. Her first fair opportunity to assert the Federal question was in the Illinois Supreme Court and this is what she did.

As shown in our Petition in this Court (p. 11), Petitioner, Ruth Page Fisher, expressly raised and relied upon her constitutional rights under the due process clause of the 14th Amendment to the Federal Constitution at her first opportunity in her Petition for Leave to Appeal from the Illinois Appellate Court to the Illinois Supreme Court. We have quoted *verbatim* in our Petition (p. 11) Petitioners' language in which she asserted her right to due process under both the 14th Amendment to the Federal Constitution and Article II, Sections 2 and 5, of the Illinois Constitution in the Illinois Supreme Court.

(b) The fact that the Illinois Supreme Court in denying the Petition for Leave to Appeal did not expressly adjudicate or pass upon the Federal question is no barrier to this Court's granting the writ of certiorari in the case at bar. If this were not true, the State Supreme Court could destroy the Federal right merely by refusing to grant the appeal based thereon, even though the Federal question had been timely presented to the State Supreme Court, as in the case at bar.

As already noted above, this Court expressly held in the cases of *Missouri* v. *Gehner*, 281 U.S. 313; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673; and *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, that it makes no difference whether the State Supreme Court does or does not pass directly in so many words upon the Federal question in denying the relief sought in that Court, *when the Federal question is timely presented to that Court, as in the case at bar.*

It is argued in Respondent's Brief (p. 8) that the Illinois Supreme Court must be assumed, "unless it can affirmatively be shown otherwise," to have denied the timely application for an appeal because of some "procedural difficulty". This begs the question, since it assumes that Petitioner's Federal right is NOT deprivation of the opportunity to be heard before judgment for possession and money costs was entered against her, but is something less which Respondent erroneously characterizes as a mere "procedural difficulty".

We conclude from what is said above that the first point in Respondent's Brief is without merit.

II.

Did Petitioner, Ruth Page Fisher, Waive Or Is She Estopped To Assert The Federal Question Because She Elected To Appeal From The Void Judgment Of The Trial Court, Instead Of Moving To Vacate The Void Judgment In The Trial Court?

Respondent's argument (p. 16) is that Petitioner, Ruth Page Fisher, "waived" and is "estopped" to assert her Federal right by her appeal from the void judgment against her for possession and money costs, without having first moved to vacate the void judgment in the Mu-

nicipal Court of Chicago. Respondent accuses her (p. 16) of keeping silent in the trial court (though she never appeared there) and then raising "a curable defect" on appeal for the first time.

The case of *American Surety Co.* v. *Baldwin*, 287 U.S. 156, cited in Respondent's Brief (p. 11, 13), expressly passed upon this very question. This Court held (p. 164) that a litigant is at liberty to invoke the Federal right to due process of law under the 14th Amendment by appealing to the State Supreme Court without first pursuing a different remedy in the State trial court provided by State procedure, and that it was only because the American Surety Company in that case had actually invoked the State remedy in the trial court and thereby lost its right to appeal to the State Supreme Court that the Federal right was lost.

This is clear from the fact that this Court said in its opinion (p. 169) in the *American Surety Company* case that the surety company, "Instead of moving to vacate [the State court judgment in the State trial court], it should have appealed directly to the State Supreme Court" for the precise reason that by moving to vacate the offending judgment in the trial court, the surety company had lost the timely opportunity to appeal to the State Supreme Court. We quote the entire language in the *American Surety Company* case (p. 169) as follows:

> "The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. *Instead of moving to vacate [the trial court judgment], it should have appealed directly to the state Supreme Court.* When later it pursued the proper course, the time for appealing had elapsed. The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed

by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of the law has been denied." (Italics added.)

Respondent argues (p. 12) that by moving to vacate the void judgment in the trial court, Petitioner, Ruth Page Fisher, *could* have cured the failure to obtain personal jurisdiction over her. As we have pointed out in our Petition (p. 10), she had to appeal from the void judgment *within five days* or lose the right of appeal and, in any event, if she had moved to vacate the void judgment, she would have voluntarily submitted herself to the future jurisdiction of the trial court. *Lord* v. *Hubert*, 12 Ill. (2d) 83, 87 (our Petition, p. 22).

This was exactly the situation in the *American Surety Company* case. If the warning in that case *not* to move to vacate the offending judgment in the trial court, but instead to appeal therefrom *before the right of appeal was lost*, was sound, then it is plain that Petitioner, Ruth Page Fisher, adopted *the only proper course* in appealing from the void judgment to the Illinois Appellate Court and later to the Illinois Supreme Court, instead of moving to vacate the void judgment and losing her right of appeal as well as submitting herself to the future jurisdiction in the trial court, exactly as this Court held in the *American Surety Company* case.

We conclude from what is said above that the second point in Respondent's Brief is without merit.

CONCLUSION.

We conclude that Petitioners have raised the question of Federal right at the earliest fair opportunity after they were surprised by the unanticipated decision of the Illinois Appellate Court, and that Petitioner, Ruth Page Fisher, has not "waived" her right, nor is she "estopped" to assert her right, to due process of law under the 14th Amendment.

It is respectfully prayed that this Court grant the prayer of our Petition and issue its writ of certiorari.

Respectfully submitted,

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